No. 14,395

IN THE

United States Court of Appeals

For the Ninth Circuit

CHARLES E. TOLIVER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under 18 United States Code, Section 3231, 28 United States Code, Sections 1291 and 1294, Rules 18 and 37(a) of the Federal Rules of Criminal Procedure.

STATEMENT OF THE CASE.

The appellant was charged in the first four counts of the indictment with substantive violations of the United States narcotic laws. The fifth count charges the appellant with a conspiracy to violate the narcotic statutes. Named in the conspiracy count as a co-conspirator but not as a co-defendant was one Abe

Brown. The co-conspirator Abe Brown had, previous to the time of appellant's trial, plead guilty to one of the narcotic violations charged against appellant (Tr. 20, 40) and appeared as a witness against the appellant.

The second count of the indictment was dismissed by the trial judge at the conclusion of the government's case (Tr. 148). The jury returned a verdict of guilty against appellant on all the remaining counts in the indictment. Appellant was sentenced to four years imprisonment and a fine of $1.00 on each of the four counts upon which he was convicted. The four year sentences on Counts One and Three were to run concurrently, and the four year sentences on Counts Four and Five were to run concurrently. However, the sentences imposed on Counts Four and Five were to run consecutively with those imposed in Counts One and Three. The fine imposed on each count was cumulative or a total fine of $4.00. Appeal was timely made to this Court from the judgment of conviction. No error is urged by appellant concerning Count One of the indictment upon which appellant was sentenced to a term of four years.

FACTS.

Co-conspirator Abe Brown had been a dealer in the narcotic trade before he ever met appellant (Tr. 55). He had his first narcotic transaction with appellant some time in December, 1951 (Tr. 73). His testimony is to the effect that at the time and place

mentioned in the third and fourth counts of the indictment he purchased on January 18, 1952 (Tr. 22, 53, 65) one half ounce of a narcotic drug, to-wit, heroin from appellant for the sum of $200 (Tr. 24, 76). Brown requested a sale of heroin from the appellant (Tr. 79) and sold it to his customers as heroin (Tr. 80). He testified that if the substance received from appellant was not heroin, his customers would demand a refund of their money (Tr. 79, 80). The witness Brown, Richards, a Narcotic Agent, and an informer by the name of Charles Haskell went by automobile to Payne's Place or Payne's Corner at 7th Street in Oakland, California, arriving about 6 P.M. on March 7, 1952 (Tr. 123). This was the same location at which most of the former transactions occurred (Tr. 25). Brown, in company of the Narcotic Agent, requested the appellant to sell him one half ounce of heroin or "a half a piece" (Tr. 69). Appellant said he was not having any hand to hand transactions (Tr. 29) but told Brown that "my boy" would complete the sale of the narcotics (Tr. 125, 133, 134). The appellant, in referring to "my boy" meant "Brother" (Tr. 165). Appellant gave directions to Brother to deliver heroin to the witness Brown (Tr. 106). The purchase price of said heroin was discussed by the appellant with Brown (Tr. 107, 109). At the time of this discussion, Brown requested the appellant to divide the delivery of the heroin into two separate packages and preserve one containing two or three "spoons" for Brown's personal use (Tr. 109).

On March 11, 1952 the defendant Toliver had a conversation with Agent Richards (Tr. 129, 130). This conversation is charged in Overt Act 2 of Count Five of the indictment. The conversation was that in response to statements by Agent Richards concerning the March 7, 1952 sale of narcotics, Toliver said: "Don't talk anything to me about that, see this fellow that you got it from." (Tr. 130).

QUESTION PRESENTED.

I. Was the evidence sufficient to establish that heroin was sold by appellant to the witness Brown on January 18, 1952?

SUMMARY OF ARGUMENT.

I. APPELLANT WAS NOT PREJUDICED BY THE DENIAL OF HIS MOTION TO STRIKE OVERT ACT 2 OF COUNT FIVE OF THE INDICTMENT.

There was admittedly one unobjectionable overt act in the conspiracy count of the indictment. One overt act in furtherance of the conspiracy is all that is necessary for a conviction under Section 371 of Title 18 United States Code. The evidence supports the inference that the conversation referred to in Overt Act 2 was in furtherance of a conspiracy to violate the narcotic statutes. Toliver stated that the Narcotic Agent should talk to another man rather than him about narcotic sales. This was the same kind of conversation which had resulted in a narcotic

sale on March 7, 1952, the conversation which is not complained of in this appeal. There is no evidence which requires a conclusion that Toliver had abandoned his role in the conspiracy by March 11, 1952.

II. DIFFERENT PUNISHMENTS MAY BE IMPOSED FOR A CONSPIRACY TO COMMIT AN OFFENSE AND THE SUBSTANTIVE OFFENSE ITSELF.

It is well settled that an agreement to violate a statute and the violation of the statute itself are two different crimes and may be punished separately.

III. TIME MAY BE FIXED IN A CONSPIRACY INDICTMENT BY THE OVERT ACTS.

The government usually has no knowledge of the exact time or place of the formation of a conspiracy. It is well settled, therefore, that the jurisdiction of the Court may be fixed by the overt acts listed in the conspiracy count of the indictment.

IV. THERE WAS SUFFICIENT EVIDENCE OF THE CORPUS DELICTI.

There was abundant circumstantial evidence that the subject of the sale made on January 18, 1952, which is charged in Counts Three and Four of the indictment, was heroin. Appellant told the witness Brown that it was. Brown, the purchaser, testified that it was. Brown's customers accepted it as heroin

and made no complaint concerning it to Brown. Furthermore, the evidence established Toliver as a narcotic dealer and heroin, testified to as such by experts, was introduced as evidence in the present trial.

ARGUMENT.

I. APPELLANT WAS NOT PREJUDICED BY THE DENIAL OF HIS MOTION TO STRIKE OVERT ACT 2 OF COUNT FIVE OF THE INDICTMENT.

The second overt act of the fifth (conspiracy) count of the indictment reads as follows: "On March 11, 1952, at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards."

Apparently appellant does not dispute the sufficiency of Overt Act 1 in the fifth count of the indictment. He has conceded that his conviction and sentence upon Count One of the indictment is proper (Appellant's Brief, page 15). Count One of the indictment charges that the defendant sold narcotics on March 7, 1952. This March 7 sale was the subject of the conversation referred to in Overt Act 1. Section 371 of Title 18 United States Code requires only that one overt act in furtherance of a conspiracy be proved. *Parmagini v. United States* (9th Cir.), 42 F.2d 721. See also *Rubio v. United States* (9th Cir.), 22 F.2d 766. Since at least one of the overt acts in Count Five of the indictment has not been attacked, the denial of appellant's motion to dismiss the second overt act could not have been prejudicial.

Furthermore, the evidence was not "susceptible of the sole interpretation that by March 11, 1952 he [Toliver] had publicly renounced and abandoned his role" [in the conspiracy] (Appellant's Brief, page 9). Mr. Richards testified that in response to his conversation concerning the March 11 narcotic sale Toliver said: "Don't talk anything to me about that, see this fellow that you got it from." (Tr. 130). He further testified that Toliver later that day questioned him concerning a man named Henry. It was Toliver's defense at the trial of the case that he was not connected with the narcotic transactions charged or with any conspiracy to violate the narcotic laws. However, the jury apparently believed that Toliver had arranged, through another person, to furnish the agent with narcotics. The conversation on March 11 was susceptible to the inference that Toliver desired Richards to deal with whom he had referred to on March 7 as "my boy" (Tr. 125). The conversation of March 7 had resulted in a sale of narcotics. The conversation of March 11 did not result in a sale. However, it is elementary that a conspiracy need not result in a successful breach of law so long as one overt act is done in furtherance of a conspiracy. 18 United States Code, Section 371.

The witness Brown had testified that Toliver told him that he "heard positive that the man [Richards] was an agent" (Tr. 33). Apparently it is this evidence which appellant feels establishes that by March 11 he had abandoned his role in the conspiracy, but the statement reported by Agent Richards indicates

only that Toliver wished Richards to deal through an intermediary and did not desire to deal directly with the agent. The conversation which occurred later that day indicates that Toliver was testing Richards to determine whether or not he was a narcotic agent.

It is clear that Toliver was by March 11 suspicious of Richards. However, the evidence is susceptible to the inference that he had not finally made up his mind and was willing to deal with Richards so long as those dealings were through an intermediary. Toliver was apparently of the view that if he had no "hand to hand dealings" he could not be successfully prosecuted for violation of the narcotic laws.

This interpretation is reinforced by Toliver's conduct on March 7 where he attempted in the presence of the agent to act the role of an innocent bystander while nonetheless setting in motion a transaction which resulted in a sale of narcotics to narcotic agents later that day. There is nothing in the record which requires the jury to find that Toliver had abandoned his role as conspirator when he had the conversation with Agent Richards on March 11 referred to in Overt Act 2. A conspiracy may properly be found to continue until it has been shown to have been abandoned. *McDonald v. United States,* 89 F.2d 128, certiorari denied; *Eldredge v. United States,* 62 F.2d 449.

II. DIFFERENT PUNISHMENTS MAY BE IMPOSED FOR A CONSPIRACY TO COMMIT AN OFFENSE AND THE SUBSTANTIVE OFFENSE ITSELF.

It is well settled that an offense and conspiracy to commit it are separate and distinct offenses. The essence of a conspiracy is the unlawful agreement. *Coates v. United States* (9th Cir.), 59 F.2d 173, 174; *Marino v. United States* (9th Cir.), 91 F.2d 691.

A conspiracy may or may not culminate in the commission of a substantive offense. Appellant cites *Pinkerton v. United States,* 328 U.S. 640, as supporting the proposition that he may not be punished for both a conspiracy to violate the narcotic statutes and for the offense itself. At the very page cited by appellant (page 643) the Supreme Court stated: "It has been long and consistently recognized by the court that the commission of the substantive offense and a conspiracy to commit it are separate and distinct offenses. The power of Congress to separate the two and affix to each a different penalty is well established." See also *Blumenthal v. United States* (9th Cir.), 158 F.2d 883; *Kramer v. United States* (9th Cir.), 147 F.2d 202; *Ellerbrake v. United States,* 134 F.2d 683; *United States v. Bazzell,* 187 F.2d 878, certiorari denied; *Maxfield v. United States* (9th Cir)., 152 F.2d 593, certiorari denied. The test to be applied to determine whether there are two offenses or only one is whether each requires proof of a fact which the other does not. *Blockburger v. United States,* 284 U.S. 299.

In the instant case the fact which a conspiracy requires to be proved which the substantive offense does not is an unlawful agreement. The substantive offense on the other hand requires proof that it has in fact been committed while a conspiracy or agreement to commit a crime becomes an indictable offense when any overt act is done in furtherance of it.

III. TIME MAY BE FIXED IN A CONSPIRACY INDICTMENT BY THE OVERT ACTS.

The overt acts in the present indictment set forth a time within the statute of limitations and a place in the Northern District of California. It is well settled in this circuit that both time and place may be fixed by the overt acts in the conspiracy count of an indictment. The time and place of the formation of the conspiracy are immaterial provided any of the overt acts were committed within the jurisdiction of the Court. The government may have no knowledge of the exact time or place of the formation of the conspiracy for conspiracies are naturally secret. *Rubio v. United States* (9th Cir.), 22 F.2d 766; *Parmagini v. United States* (9th Cir.), 42 F.2d 721; *Heskett v. United States* (9th Cir.), 58 F.2d 897; *Woitte v. United States* (9th Cir.), 19 F.2d 506.

IV. THERE WAS SUFFICIENT EVIDENCE OF THE CORPUS DELICTI.

Appellant argues that the evidence was insufficient to support a conviction on Counts Three and Four of the indictment on the grounds that there was insufficient evidence that heroin was transported from the defendant to the witness Brown on January 18, 1952. As to these counts, there were no narcotics introduced into evidence.

The fact that a substance is narcotics can be proved by circumstantial evidence. *Banks v. United States* (9th Cir.), 147 F.2d 628. It has been held that the testimony of drug addicts based upon their sight and taste is sufficient to establish the *corpus delicti* of a sale and purchase of heroin or marihuana. *United States v. Tramaglino,* 197 F.2d 928, 932.

In one case a test evaporated the heroin prior to trial. The Court held that the agent's testimony, if credible, was sufficient. *United States v. Adelman,* 107 F.2d 497, 498. See also *Pennacchio v. United States,* 263 Fed. 66.

In the present case there was abundant circumstantial evidence that the substance sold on January 18, 1952 was heroin. The evidence established that Toliver had engaged in at least two other narcotic transactions (Tr. 30, 35, 73, 74). The witness Brown testified that on January 18 he asked Toliver for heroin and paid $200 for half an ounce (Tr. 25, 69, 77). When asked on cross-examination how he knew the substance was heroin he said that he took appellant's word for it but that it was a white powder

and that his customers did not complain about it (Tr. 79). He further testified that the "stuff" was in wax papers. There was evidence as to another narcotic transaction in which the heroin itself had been examined by experts and introduced into evidence. This transaction is apparently conceded by appellant since he raises no question as to the conviction in Count One (Appellant's Brief, page 15).

The jury could have taken the defendant Toliver's word, as transmitted to them by the testimony of the witness Brown, that the substance which changed hands on January 18, 1952 was heroin. Toliver, after all, was in the best position to know whether the substance was heroin or not and he said that it was. His admission on that occasion was in no sense a confession and the *corpus delicti* need not have been established prior to the introduction of his statement. See *Davena v. United States,* 198 F.2d 230; *Wiggins v. United States,* 64 F.2d 950; *Warzower v. United States,* 312 U.S. 342. His statement plus the other corroborative evidence in the case is sufficient, if believed by the jury, to establish the *corpus delicti.*

CONCLUSION.

There was in this case abundant evidence for the jury to find that the defendant Charles E. Toliver violated the narcotic laws of the United States. The questions raised by appellant are, for the most part, an attempt to relitigate issues which have been de-

cided adversely to him by the jury. The judgment of conviction in this case should be affirmed.

Dated, San Francisco, California,
January 17, 1955.

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Assistant United States Attorney,
RICHARD H. FOSTER,
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(Appendices A and B Follow.)

Appendices A and B.

Appendix A

STATUTES.

Title 18 United States Code, Section 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 21 United States Code, Section 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two years or more than five years. . . .

Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

Title 26 United States Code, Section 2553

It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate tax-paid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found; and the possession of any original stamped package containing narcotic drugs by any person who has not registered and paid special taxes as required by sections 3221 and 3220 shall be prima facie evidence of liability to such special tax.

Title 26 United States Code, Section 2557

(b) *Violations in general.*

(1) Whoever commits an offense or conspires to commit an offense described in this subchapter, subchapter C of this chapter, or parts V and VI of subchapter A of chapter 27, for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than two or more than five years . . .

Appendix B

INDICTMENT.

FIRST COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553, 2557)

The Grand Jury charges that Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 7th day of March, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin.

SECOND COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the first count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one envelope containing approximately 128 grains of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew.

THIRD COUNT: (Harrison Narcotic Act, 26 U.S.C. 2553, 2557)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, on or about the 18th day of January, 1953, in the City of Oakland, County of Alameda, State of California, within the Southern Division of the Northern District of California, unlawfully did sell, dispense and distribute, not in or from the original stamped package, a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin.

FOURTH COUNT: (Jones-Miller Act, 21 U.S.C. 174)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, at the time and place mentioned in the third count of this indictment, within the Southern Division of the Northern District of California, fraudulently and knowingly did conceal and facilitate the concealment of a certain quantity of a derivative and preparation of morphine, to-wit, a lot of heroin, in quantity particularly described as one bindle containing approximately 1 ounce of heroin, and the said heroin had been imported into the United States of America contrary to law, as the said defendant then and there knew.

FIFTH COUNT: (Conspiracy, 18 U.S.C. 371)

The Grand Jury further charges that Charles E. Toliver, alias Little Snooks, the defendant herein, and Abe Brown named herein as co-conspirator but not as

a defendant, did conspire together and with divers other persons whose names are to said Grand Jury unknown, to sell, dispense and distribute, not in or from the original stamped package, a quantity of a derivative and preparation of morphine, to-wit, heroin, in violation of Sections 2553 and 2557 of Title 26 United States Code, and to conceal and facilitate the concealment and transportation of a derivative and preparation of morphine, to-wit, heroin, which heroin had been imported into the United States of America contrary to law, as said defendant then and there well knew, in violation of Section 174 of Title 21 United States Code, and thereafter and during the existence of said conspiracy the said defendant, in the Southern Division of the Northern District of California, did the following acts in furtherance of and to effect the objects of the conspiracy aforesaid.

Overt Acts.

1. On March 7, 1953 in the vicinity of 7th and Center Streets, at Oakland, California, defendant Charles E. Toliver, alias Little Snooks, and co-conspirator Abe Brown had a conversation.

2. On March 11, 1953 at San Francisco, California, the defendant Charles E. Toliver, alias Little Snooks, had a conversation with Narcotic Agent Malcolm Richards.

A True Bill,

.....

Foreman

/s/ Lloyd H. Burke
Lloyd H. Burke
United States Attorney